

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

17-P-1180

COMMONWEALTH

vs.

ELVIN DIAZ.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

A grand jury returned indictments charging the defendant and his brother, Carlos Diaz, with various offenses stemming from three separate altercations involving different victims.<sup>1</sup> Following a jury trial, Carlos was acquitted on the single indictment on which he was charged. The defendant was convicted of one offense, assault and battery by means of a dangerous weapon causing serious bodily harm, in violation of G. L. c. 265, § 15A (c) (i), against Manuel Antonio Urbina.<sup>2</sup> On appeal, the defendant argues that (1) the admission of two out-of-court identifications made through interpreters (Spanish-speaking police officers) who did not testify violated the rule

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<sup>1</sup> Because the defendant, his brother, and a number of witnesses share the same surnames, we use first names to avoid confusion.

<sup>2</sup> The jury acquitted the defendant on two counts of assault and battery by means of a dangerous weapon, in violation of G. L. c. 265, § 15A (b).

against hearsay and his confrontation rights under the Sixth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights; and (2) improprieties in the prosecutor's conduct at trial, including in his cross-examination of the defendant and in closing argument, were errors that created a substantial risk of a miscarriage of justice. We affirm.

Background. We summarize only those facts relevant to the issues raised on appeal. On the evening of June 20, 2015, Manuel was walking to the home of his brother, Moises Avalos, when he ran into his nephew, Wilson Noel Urbina Sanchez. Wilson was waiting for his brother, Omar Urbina. At about the same time, the defendant and Carlos approached Wilson. Wilson knew the two and there was an ongoing dispute between them over a missing bracelet. A fight broke out during which the defendant and Carlos allegedly struck Manuel and Wilson with beer bottles.<sup>3</sup> Manuel, who does not speak English, asked a bystander to call 911. Meanwhile, the defendant and Carlos left the area and had walked about one block when they were confronted by Manuel, Wilson, and Omar, who had arrived on the scene. Omar approached Carlos and told him that the police were coming, while Manuel and Wilson approached the defendant. Soon thereafter, the

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<sup>3</sup> The defendants were acquitted of offenses arising from this alleged conduct.

defendant stabbed Manuel in the chest with a folding knife. The defendant and Carlos immediately ran away and were followed by Omar and Wilson. As the group was running, Moises arrived and confronted the defendant, who brandished a knife and threatened to kill him. Ultimately, the defendant and Carlos were pursued to a parking lot where another fight ensued. The defendant initially hid under a car, but then entered the fray wielding a knife. A security guard, who was standing nearby, disarmed the defendant and secured him until the police arrived.

Upon arriving at the scene, the police arranged for Manuel, who was seriously injured, to be transported to the hospital and then arrested the defendant and Carlos. Before the defendant was taken to the police station, he was presented to Omar and other witnesses in a series of one-on-one showup identifications conducted by Boston Police Detective John Joyce. Omar understood some English, but was more comfortable in his first language, Spanish. Officer Calderon, who spoke Spanish, assisted during the identification procedure. When Omar saw the defendant he said, as translated by Officer Calderon into English, "That's the one that had the knife." Additional showup identifications with Wilson, Moises, and the security guard were conducted at the scene by Detective Thomas Kelley.

About four days later, Boston Police Detective Joseph Scaringello went to the hospital to interview Manuel and to show

him a photographic array that included a photograph of the defendant. Detective Scaringello was accompanied by two other police officers, one of whom, Officer James Giraldo, spoke Spanish. Manuel selected the defendant's photograph and said, as translated by Officer Giraldo, "This is the man who put the knife in me."<sup>4</sup> Detective Scaringello wrote the English translation underneath the defendant's photograph, and asked Manuel to sign his name. Manuel printed part of his name, "Manuel-Antonio."

At trial, the defendant did not dispute that he was involved in the stabbing. The defense theory was that Manuel attacked the defendant first and stabbed himself as the defendant was protecting himself. The defendant testified on his own behalf and told the jury that Manuel "grabbed [him] by the throat then and . . . pulled out a knife. And so [the defendant] tried to break loose and [Manuel] grabbed his hand, and [he thinks] that [Manuel] stabbed himself when that happened." In accordance with the defendant's version of events, the judge instructed the jury on self-defense.

Discussion. 1. Identification testimony. Detective Joyce testified at trial about the showup identification procedure he

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<sup>4</sup> Manuel further stated, "'[A]nd this is the same guy who stabbed my nephew' and also hit my nephew with a bottle 'in the ear.'" This statement relates to the charges of which the defendant was acquitted.

conducted with Omar. Detective Joyce related that Omar identified the defendant as the person "that had the knife." In doing so, Detective Joyce related the English language version of Omar's statement as translated to him by Officer Calderon. Detective Scaringello testified that Manuel identified the defendant from a photographic array and, like Detective Joyce, he related the English language version of Manuel's statements, as translated by Officer Giraldo (and as written by Scaringello on the photographic array), to the jury. Neither Officer Calderon nor Officer Giraldo testified. The defendant did not object to Detective Joyce's testimony, but he did object to Detective Scaringello's testimony, claiming that the admission of Manuel's statements through Detective Scaringello (instead of Officer Giraldo) violated the rule against hearsay. The defendant also claimed that the statements were inadmissible because Manuel had not adopted them.<sup>5</sup> Lastly, the defendant argues that the Commonwealth's failure to call Officers Calderon and Giraldo as witnesses violated his confrontation rights.

a. Hearsay. As the Commonwealth appropriately concedes, the challenged testimony was hearsay. In both instances, only the Spanish-speaking officers who translated the statements made

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<sup>5</sup> Though Manuel did not specifically adopt the statements in question during his trial testimony, he did not refute them. To the contrary, apparently referring to both the defendant and Carlos, Manuel asserted that "[t]hey stabbed me." We therefore discern no merit to this argument.

by Omar and Manuel (Officers Calderon and Giraldo) were competent to testify about the identifications. See Mass. G. Evid. § 801(d)(1)(C) (2019). Although the testimony was admitted erroneously, we discern no basis for reversing the conviction.

We turn first to the admission of Detective Joyce's testimony, which requires little discussion. Though hearsay, once admitted, the "jurors were entitled to give it such probative effect as they deemed appropriate." Commonwealth v. Paniaqua, 413 Mass. 796, 803 (1992).<sup>6</sup> Our inquiry is limited to determining whether the jury's consideration of the hearsay created a substantial risk of a miscarriage of justice. See Commonwealth v. Keevan, 400 Mass. 557, 562 (1987). Here, given the fact that identification of the defendant was not a contested issue at trial, we discern no such risk.

By contrast, the admission of Detective Scaringello's testimony requires more discussion.<sup>7</sup> We review nonconstitutional

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<sup>6</sup> For the same reason, there likewise was no substantial risk of a miscarriage of justice when Detective Kelly testified without objection about the showup identifications conducted with Wilson, Moises, and the security guard. Assuming without deciding that the statements were hearsay, we conclude there was no such risk given the defendant's testimony that he was involved in the stabbing.

<sup>7</sup> We note that the judge initially ruled that Detective Scaringello could not testify about Manuel's identification unless Officer Giraldo testified. Ultimately, however, Detective Scaringello was permitted to testify and to read the statements attributed to Manuel that were written in English on

errors, preserved through objection at trial, to determine whether they created prejudicial error. Commonwealth v. Vinnie, 428 Mass. 161, 163, cert. denied, 525 U.S. 1007 (1998). "An error is nonprejudicial only" if we can be "sure that the error did not influence the jury, or had but very slight effect" (citation omitted). Commonwealth v. Flebotte, 417 Mass. 348, 353 (1994).

Here, we are confident that the error did not influence the jury. As we have noted, identification was not a live issue at trial. The defendant never disputed that he was involved in the stabbing. Rather, he claimed that he was not responsible for Manuel's injuries because he (the defendant) acted in self-defense. Furthermore, Manuel's statement that the defendant "put the knife in" him was not inconsistent with the defendant's testimony that when he grabbed Manuel's hand, Manuel got stabbed.

In addition, as the Commonwealth argues in its brief, the jury acquitted the defendant of two charges of assault and battery against Wilson, one with a knife and one with a bottle. The jury did so even though Manuel's second statement to the police, also recorded on the photographic array, was, "'[A]nd this is the same guy who stabbed my nephew' and also hit my

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the photographic array under the defendant's photograph. The record does not disclose the reason for the change in the judge's ruling.

nephew with a bottle 'in the ear.'" The acquittals demonstrate that the error did not prejudice the defendant and that "the jury carefully considered the evidence with regard to each crime charged." Commonwealth v. Delaney, 425 Mass. 587, 595 (1997).

b. Confrontation rights. The defendant also argues that the admission of statements made by Omar and Manuel to interpreters, namely Officers Calderon and Giraldo respectively, violated his right of confrontation. Passing on the question whether this issue was preserved, we conclude that there was no constitutional violation because both Omar and Manuel testified and were subject to cross-examination. Thus, even if we were to assume that Officers Calderon and Giraldo were the declarants and that the right of confrontation attached to their translations, an issue not yet decided by our courts, see Commonwealth v. AdonSoto, 475 Mass. 497, 505-506 (2016), the defendant's confrontation rights were not violated. The right to confrontation governs "[t]estimonial statements of witnesses absent from trial" (emphasis added). Crawford v. Washington, 541 U.S. 36, 59 (2004). As neither Omar nor Manuel were absent from trial, the defendant's claim fails.

2. The prosecutor's cross-examination. The defendant testified with the assistance of a Spanish-language translator. As previously noted, he claimed that he was defending himself when Manuel was stabbed. During cross-examination, the



prosecutor sought to establish that the defendant did not properly act in self-defense because he had the opportunity to retreat and did not do so. See Commonwealth v. Leoner-Aguirre, 94 Mass. App. Ct. 581, 584 (2018). To this end, the prosecutor posed a series of questions about the area in which the stabbing occurred, suggesting that the defendant could have walked along the sidewalk in the opposite direction from the persons who allegedly wanted to hurt him. The prosecutor's tone became aggressive when the defendant did not answer "yes" or "no" to some of the questions. The prosecutor repeatedly asked the defendant to answer his question and made comments like, "Let's try my question again" and "I'll try this again" when the defendant's answers were not responsive.<sup>8</sup>

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<sup>8</sup> The challenged line of questioning began as follows:

Q.: "Okay. Let's try my question again. Is there a sidewalk that would allow you to walk in the opposite direction from the men that are approaching you? Yes or no?"

A.: "I don't understand."

Q.: "Fair enough."

The prosecutor then referred to a map, apparently pointed to a part of it, and continued with his questions.

Q.: "Mr. Diaz, do you know what this part that's depicted in this picture here, what that's called?"

When the defendant identified the corner where he was waiting to cross the street, the prosecutor continued.

Q.: "Absolutely. Sir, what is the part where your feet touch the pavement where you walk called?"

A.: "I call it 'sidewalk' in Spanish."

Q.: "Oh, so you know what a sidewalk is. Okay, perfect. Was there a sidewalk that allowed you to go in the opposite direction of the individuals that were approaching you?"

The defendant argues that the prosecutor adopted a "needlessly mocking tone" and that the "nature of the questioning insinuated that the prosecutor knew [the defendant] was lying." As there was no objection to the challenged questions, our review is limited to determining whether there was error and, if so, whether it created a substantial risk of a miscarriage of justice. Commonwealth v. Grandison, 433 Mass. 135, 141-142 (2001).

A sarcastic cross-examination can be improper. See, e.g., Commonwealth v. Cadet, 473 Mass. 173, 186 (2015); Commonwealth v. Kines, 37 Mass. App. Ct. 540, 543 n.3 (1994). We agree with the defendant that several of the prosecutor's questions and comments reasonably could be viewed as sarcastic. Although we do not condone the prosecutor's conduct, we conclude that, even if error, there was no substantial risk of a miscarriage of justice. Contrary to the defendant's assertion, there was nothing in the questions themselves that implied the prosecutor had independent knowledge relating to the defendant's

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The defendant did not answer the question directly. The prosecutor asked four more questions, including one that twice asked for a yes or no answer, and received four nonresponsive answers. The prosecutor then said, "I'll try this again. We've established you know what a sidewalk is."

At this point, the judge intervened and told the prosecutor to ask a question. The prosecutor attempted twice more to elicit the information before giving up, and then started a new line of inquiry.

credibility. Moreover, even if we were to assume that the prosecutor adopted a mocking tone, he did not directly insult or denigrate the defendant.

3. The prosecutor's closing argument. The defendant challenges two asserted improprieties in the prosecutor's closing argument. The defendant did not object and therefore, as with the challenge to the prosecutor's cross-examination, we must determine whether there was an error that created a substantial risk of miscarriage of justice. Grandison, 433 Mass. at 141-142. Although the remarks warrant criticism, in reviewing the argument as a whole and the judge's instructions to the jury, see Commonwealth v. Cole, 473 Mass. 317, 333 (2015), we conclude there was no error and therefore no risk that justice miscarried.

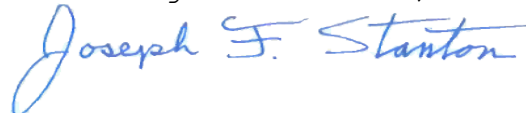
First, the defendant contends that the prosecutor exceeded the bounds of proper argument when, in reference to the defendant's version of events, he stated, "Does that make a drop of sense? He's asking you to check your common sense, literally, your common sense at the door, and say, 'Aaron Hernandez, he stabbed himself. I don't know why he did it. He stabbed himself.' Does that make any sense at all? That's what that was." Although the prosecutor's appeal to common sense was permissible, see Mass. G. Evid. § 1113(b)(2) (2019), that appeal was accompanied by remarks that came close to impugning the

integrity of the defense. As such, the remarks, particularly the reference to Aaron Hernandez, were better left unsaid.

Next, the defendant contends that the prosecutor unjustifiably demeaned the defense by characterizing it as "malarkey." We agree with the defendant that calling the theory of the defense malarkey is similar to characterizing it as a sham. Our cases hold that a prosecutor may address a particular point in defense counsel's closing argument as a sham, but he may not characterize the entire defense as such. Commonwealth v. Lewis, 465 Mass. 119, 130 (2013). Here, for a second time, the prosecutor came close to crossing the line of proper argument. A prosecutor may argue forcefully for a conviction, but he should not disparage the defendant, trial counsel, or the defense. See Commonwealth v. Kozec, 399 Mass. 514, 516 (1987). In sum, such negative characterizations should be avoided.

Judgment affirmed.

By the Court (Vuono,  
Massing & Wendlandt, JJ.<sup>9</sup>),



Clerk

Entered: July 11, 2019.

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<sup>9</sup> The panelists are listed in order of seniority.